

Supreme Court, U.S.
FILED

No. 05-436 OCT 3 2005

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In The
Supreme Court of the United States

THOMAS H. BUSH,

Petitioner,

v.

STATE OF WISCONSIN,

Respondent.

On Petition For A Writ Of Certiorari
To The Supreme Court Of Wisconsin

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Wisconsin's Sexually Violent Persons civil commitment statute is violative of due process because it fails to require proof of a recent overt act.

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OPINION BELOW

The Wisconsin Supreme Court opinion is published. See *In re the Commitment of Thomas H. Bush: State of Wisconsin v. Thomas H. Bush*, 2005 WI 103. The opinion is included in the Appendix.

JURISDICTION

The Wisconsin Supreme Court filed its opinion on July 6, 2005 and issued its order affirming the lower court decision issued by the Wisconsin Court of Appeals. This Court has jurisdiction pursuant to 28 U.S.C. §1257.

STATUTORY PROVISIONS INVOLVED

Chapter 980 Wisconsin Statutes

"980.01 Definitions. In this chapter:

(1) "Department" means the department of health and family services.

(1m) "Likely" means more likely than not.

(2) "Mental disorder" means a congenital or acquired condition affecting the emotional or volitional capacity that predisposes a person to engage in acts of sexual violence.

(4) "Secretary" means the secretary of health and family services.

(4m) "Serious child sex offender" means a person who has been convicted, adjudicated delinquent or found not guilty or not responsible by reason of insanity or mental disease, defect or

illness for committing a violation of a crime specified in s. 948.02(1) or (2) or 948.025(1) against a child who had not attained the age of 13, years.

(5) "Sexually motivated" means that one of the purposes for an act is for the actor's sexual arousal or gratification.

(6) "Sexually violent offense" means any of the following:

(a) Any crime specified in s. 940.225(1) or (2), 948.02(1) or (2), 948.025, 948.06 or 948.07.

(b) Any crime specified in s. 940.01, 940.02, 940.05, 940.06, 940.19(4) or (5), 940.195(4) or (5), 940.30, 940.305, 940.31 or 943.10 that is determined, in a proceeding under s. 980.05(3)(b), to have been sexually motivated.

(c) Any solicitation, conspiracy or attempt to commit a crime under par. (a) or (b).

(7) "Sexually violent person" means a person who has been convicted of a sexually violent offense, has been adjudicated delinquent for a sexually violent offense, or has been found not guilty of or not responsible for a sexually violent offense by reason of insanity or mental disease, defect, or illness, and who is dangerous because he or she suffers from a mental disorder that makes it likely that the person will engage in acts of sexual violence.

980.02 Sexually violent person petition; contents; filing. (1) A petition alleging that a person is a sexually violent person may be filed by one of the following:

(a) The department of justice at the request of the agency with jurisdiction, as defined in s. 980.015(1), over the person. If the department of justice decides to file a petition under this paragraph, it shall file the petition before the date of the release or discharge of the person.

(b) If the department of justice does not file a petition under paragraph (a), the district attorney for one of the following:

1. The county in which the person was convicted of a sexually violent offense, adjudicated delinquent for a sexually violent offense or found not guilty of or not responsible for a sexually violent offense by reason of insanity or mental disease, defect or illness.

2. The county in which the person will reside or be placed upon his or her discharge from a sentence, release on parole or extended supervision, or release from imprisonment, from a secured correctional facility, as defined in s. 938.02(15m), from a secured child caring institution, as defined in s. 938.02(15g), from a secured group home, as defined in s. 938.02(15p), or from a commitment order.

(2) A petition filed under this section shall allege that all of the following apply to the person alleged to be a sexually violent person:

- (a) The person satisfies any of the following criteria:

1. The person has been convicted of a sexually violent offense.

2. The person has been found delinquent for a sexually violent offense.

3. The person has been found not guilty of a sexually violent offense by reason of mental disease or defect.

(ag) The person is within 90 days of discharge or release, on parole, extended supervision or otherwise, from a sentence that was imposed for a conviction for a sexually violent offense, from a secured correctional facility, as defined in s. 938.02(15m), from a secured child caring institution, as defined in s. 938.02(15g), or from a secured group home, as defined in s. 938.02(15p), of the person was placed in the facility for being adjudicated delinquent under s. 938.183 or 938.34 on the basis of a sexually violent offense or from a commitment order that was entered as a result of a sexually violent offense.

(b) The person has a mental disorder.

(c) The person is dangerous to others because the person's mental disorder makes it likely that he or she will engage in acts of sexual violence.

980.09 Petition for discharge procedure.

(2) PETITION WITHOUT SECRETARY'S APPROVAL. (a) A person may petition the committing court for discharge from custody or supervision without the secretary's approval. At the time of an examination under s. 980.07(1) the secretary shall provide the committed person with a written notice of the person's right to petition the court for discharge over the secretary's objection. The notice shall contain a waiver of rights. The secretary shall forward the notice and waiver form to the court with the report of the department's examination under s. 980.07. If

the person does not affirmatively waive the right to petition, the court shall set a probable cause hearing to determine whether facts exist that warrant a hearing on whether the person is still a sexually violent person. The committed person has a right to have an attorney represent him or her at the probable cause hearing, but the person is not entitled to be present at the probable cause hearing."

STATEMENT OF FACTS

On March 24, 1997, the District Attorney for Eau Claire County filed a petition maintaining that the respondent was a Sexually Violent Person (hereinafter referred to as "SVP") as defined in §980.04(2), Wis. Stats. (App. 37). A jury returned a verdict which found that the respondent satisfied the criteria for an SVP. He was committed to a state mental facility on August 19, 1997. An appeal resulted in reversal of the commitment and order for a new trial. The second jury again found that the petitioner was a sexually violent person. The commitment was affirmed on appeal on November 26, 2002, with one exception, to wit: that the state had failed to prove that the petition had been filed within ninety days of the petitioner's release, as required by *In re Commitment of Thiel*, 2001 WI App. 52. The matter was remanded for a trial on that sole issue.

On March 24, 2003, the court conducted a trial of the remanded issue, after which it determined that the petition had been timely filed. The respondent, however, filed a petition for discharge, pursuant to Wis. Stats. §980.09. (App. 57-61). On March 23, 2003, the jury which heard the